85-1070

Supreme Court, U.S.
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No.

In The
United States Supreme Court

OCTOBER TERM, 1985

MAJOR TRAVIS JONES,
CAPTAIN CLOVIS TILLARY, AND
LIEUTENANT FAREN RACHAL,
Cross-Petitioners,

VERSUS

RICHARD EUGENE THORNE,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Under the Fourth Amendment, can state prison authorities condition physical access to the grounds of a state maximum security penal enclave on submission to a purely visual strip search, so long as the visitor is given notice of the search and is given the option of leaving the prison grounds rather than submitting to the search?

2. If such a policy is not reasonable under the Fourth Amendment, how much suspicion is required before state prison authorities can request that a visitor submit to a purely visual strip search or leave the grounds of a state maximum security penal enclave?

3. If a visitor to a state maximum security penal enclave knowingly agrees to submit to a purely visual strip search by state prison authorities, has the visitor waived the Fourth Amendment in regards to the justification for initiating the search?

PARTIES TO THE APPEAL BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The parties to the appeal before the United States Court of Appeals for the Fifth Circuit were the following:

The Appellees-Cross-Appellants

a. Assistant Warden for Security Herbert D. Byargeon (Retired)
b. Major Travis Jones (Retired)
c. Captain Ray Alvin Whitstine
d. Captain Clovis Tillary
e. Lieutenant Faren Rachal
f. Sergeant Ronald Lemoine

The Appellants-Cross-Appellees

a. Peggy L. Thorne
b. Richard Eugene Thorne
c. Richard James Thorne (Former Prisoner)
d. Scott Allen Thorne (Former Prisoner)

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joseph erwin kopsa

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Major Travis Jones, Captain Clovis Tillary and Lieutenant Faren Rachal, your cross-petitioners, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, which reversed and remanded the judgment of the United States District Court for the Middle District of Louisiana, which held in favor of the cross-respondents.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix B, infra), is reported at 765 F.2d 1270. The denial of petition for rehearing and re-

hearing en banc by the United States Court of Appeals for the Fifth Circuit (Appendix C, infra) is reported at 772 F.2d 904.

The opinion of the United States District Court for the Middle District of Louisiana (Appendix A, infra), is reported at 585 F.Supp 910. The jury verdicts in the United States District Court for the Middle District of Louisiana are unreported. The rulings on attorney's fees objection to jury instructions, rulings on motions for directed verdict, and ruling on motions for summary judgment are unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit is in the form of its opinion and was entered on July 22, 1985 (Appendix B, infra). Petitions for rehearing and rehearing en banc were denied by the United States Court of Appeals for the Fifth Circuit on August 23, 1985 (Appendix C, infra). Jurisdiction of This Court is envoked under 28 U.S.C. Sections 1254(1) and 2101(c) and Rules 17(a) and (c) of the United States Supreme Court.

This cross-petition for writ of certiorari is filed under Rule 19.5 of the United States Supreme Court Rules. The petition for Writ of Certiorari was received by counsel for cross-petitioners on November 22, 1985, and is captioned *Richard Eugene Thorne, et ux. v. Major "A.B." Jones, et al.*, Number 85-5961.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part that:

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ."

The regulation of the Secretary of the Louisiana Department of Corrections Regulation 30-25 and memorandum from Richard Crane dated November 8, 1978, are set out in Appendix D and E, respectfully.

STATEMENT OF THE CASE

The plaintiffs in the District Court were Richard Eugene Thorne (Mr. Thorne), Peggy L. Thorne (Mrs. Thorne), Richard James Thorne (Prisoner R. Thorne), and Scott Allen Thorne (Prisoner S. Thorne). Mr. and Mrs. Thorne are the parents of Prisoners R. and S. Thorne. In 1981 both Prisoners R. and S. Thorne were confined at the Louisiana State Penitentiary (L.S.P.) at Angola, Louisiana, which is this nation's largest maximum security prison in terms of both population and area. L.S.P. houses about Four Thousand Seven Hundred (4,700) adult male prisoners, all of whom are classified as maximum security prisoners. This maximum security penal enclave is comprised of a main prison complex, eight out camps, hospital complex, administrative offices, agriculture complex, vocational training and education complex, living quarters for single employees, and a small community for employees sprawled across Eighteen Thousand (18,000) acres which are surrounded by the Mississippi River and the rugged Tunica Hills. See: Appendix G, infra. L.S.P. is under the jurisdiction of the Secretary of the Louisiana Department of Public Safety and Corrections. (Since the filing of this suit, the Department of Corrections and Department of Public Safety have been combined).

In addition to L.S.P., the Secretary of the LPS&C was responsible in 1981 for six (6) other adult male prisons consisting primarily of minimum and medium security prisoners, one (1) adult female prison, three (3) male juvenile institutions, (1) female juvenile institution, and two (2) intake institutions, (one (1) for adults and one (1) for juveniles).

Both Prisoners R. and S. Thorne requested of the Warden at L.S.P. that Mr. and Mrs. Thorne be placed on the approved visitor's list at L.S.P. The appropriate forms were sent to Mr. and Mrs. Thorne, who filled them out. On those forms signed by Mr. and Mrs. Thorne, they agreed to be searched by prison employees while on the grounds of L.S.P. See: Appendix F, infra. Mr. and Mrs. Thorne were placed on the approved visitor's lists for both Prisoners R. and S. Thorne. During his incarceration at L.S.P., Prisoner S. Thorne's only regular visitors were Mr. and Mrs. Thorne. Mrs. Thorne twice monthly, and Mr. Thorne on a less frequent basis.

Just outside the gates of L.S.P. is a large sign telling visitors, among other things, that they are subject to search of their persons upon entering or while on the grounds of L.S.P.

The policy of the Secretary in regards to searching of visitors was that visitors were subjected to pat searches of their persons, and complete searches of belongings such as purses, bags, hats, etc. No visitor was to be forced to undergo a strip search absent a warrant; however, a visitor could be requested to undergo a visual strip by an authorized prison employee. The visitor would then be given the option of agreeing to the search or refusing to be strip

searched. If the visitor refused the request, the visitor would be escorted off the ground and removed from the approved visitors' lists. That visitor could be placed back on the visitors' lists by reapplying to the Warden. If the visitor specifically consented to the visual strip search, it would be conducted by two to three employees of the same sex as the visitor in specifically designed "shakedown" rooms which guaranteed privacy. The search was purely visual in that the visitor removed his clothing, the employees conducting the search were not allowed to touch the visitor, but only visually observe the visitor and physically search the visitor's clothing. See: Appendix D and E, infra.

Upon his arrival at L.S.P. as Warden in late 1981, Ross Maggio, Jr., instituted a practice regarding "strip shakedown" of visitors. His prison employees would have to present to him some suspicion upon which to make a request to a visitor to submit to a visual strip search prior to his authorizing a "strip shakedown" of a particular visitor. All "strip shakedowns" by visitors had to be authorized by Warden Maggio.

In late November, 1981, a reliable and confidential inmate informant at Camp D of L.S.P. told Captain Ray Alvin Whitstine, shift commander at Camp D, that Prisoner S. Thorne was regularly receiving narcotics through the visiting room at Camp D, probably from his mother, and that another prisoner at Camp D was receiving narcotics through his legal mail. On orders from Warden Maggio, a mail watch was placed on the second prisoner's legal mail. The "mail watch" turned up narcotics in the legal mail of the second prisoner prior to the next visit of

either Mr. or Mrs. Thorne. After reviewing Prisoner S. Thorne's visitor card, "shakedown notices" were placed on Mr. and Mrs. Thorne by order of Warden Maggio.

On December 3, 1981, Mrs. Thorne arrived at the front gate of L.S.P. to visit Prisoner S. Thorne. She was subjected to a pat down search of her person and a search of her belongings at the front gate visitor's shed. Mrs. Thorne then boarded the prison's visitor bus and was taken to Camp D. When Mrs. Thorne arrived at the Entrance Building for Camp D, Captain Whitstine requested of Mrs. Thorne that she submit to a strip search. Mrs. Thorne refused, with some verbal heat, to be searched. She was escorted back to the front gate and departed. Warden Maggio had Mrs. Thorne removed from the approved visitors' lists. She never requested to have her name placed back on the approved visitors' lists.

Mr. Thorne arrived at L.S.P. the next day, December 4, 1981, to visit with Prisoner S. Thorne. He was subjected to a pat down of his person and search of his belongings at the front gate entrance shed. He got on the visitor's bus and was taken to the Entrance Building of Camp D. The prison employees checked with Warden Maggio who reconfirmed the "strip shakedown" on Mr. Thorne. Captain Clovis Tillary requested of Mr. Thorne that he submit to a strip search. Mr. Thorne specifically consented to the strip search, which was conducted in the "Shakedown Room" of the Camp D Entrance Building in front of Captain Tillary, Lieutenant Faren Rachal and Sergeant Ronald Lemoine. The search was purely visual as to Mr. Thorne's body. No contraband was found and Mr. Thorne completed his visit with Prisoner S. Thorne.

The evidence showed that Prisoner S. Thorne had been involved with unlawful narcotics use or possession prior to and during his incarceration. The evidence also showed that narcotics have caused serious problems at L.S.P. and that the only three sources of these narcotics are the mail, prison employees and visitors. Additionally, the use of other less drastic searches such as pat downs, metal detectors, dogs, etc., are of little or no use in detecting small amounts of narcotics smuggled into L.S.P. on one's person, particularly when balloons are used to contain the narcotics.

The Thornes all brought separate suits. Mrs. Thorne brought suit against Warden Maggio, Major Jones, Captain Whitstine, Secretary King, and the Louisiana Department of Corrections. Mr. Thorne brought suit against Warden Maggio, Major Jones, Captain Tillary, Lieutenant Rachal, Sergeant Lemoine, Secretary King, and the Louisiana Department of Corrections. These two suits were brought pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3), raising violations of the First and Fourth Amendments as made applicable to the states through the Fourteenth Amendment, as well as the Fifth Amendment and several state claims. Summary judgments, which were denied by Chief Judge Parker, were filed by all parties in both cases. Among other arguments, the defendants claimed that their policy was reasonable and therefore did not violate the First or Fourth Amendment; Mr. Thorne consented to the strip search; and reasonable suspicion existed as to Mr. Thorne. The defendants submitted supporting affidavits; the plaintiffs did not.

Prisoners S. and R. Thorne filed separate suits against Warden Maggio, Assistant Warden Byargeon, Secretary King, and the Louisiana Department of Corrections pursuant to 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3), raising violations of the First Amendment as made applicable to the states through the Fourteenth Amendment, as well as several state claims.

All four suits were consolidated and a pretrial order, under which all claims were dropped by the Thornes except for the alleged violations of the First and Fourth Amendments, was entered into the record. Motions to dismiss under Rule 12b 1 and 2 were filed on behalf of the Louisiana Department of Corrections. Both motions were granted.

At the close of the Thornes' case-in-chief and the close of the evidence, the defendants all moved jointly for directed verdicts on several grounds, including the reasonableness of the strip search policy, that suspicion existed as to Mr. Thorne, and that Mr. Thorne had consented to the visual strip search. The motions for directed verdicts were denied by Chief Judge Parker at both stages, except as to Secretary King which was granted, thus dismissing him from all suits.

Chief Judge Parker also refused to instruct the jury on the issue of consent, which was objected to in a timely manner by the defendants.

The jury returned separate verdicts against Major Jones and Captain Whitstine in Mrs. Thorne's case for fifteen thousand ($15,000.00) dollars; ten thousand ($10,000.00) for Mr. Thorne against Major Jones, Captain Tillary, Lieutenant Racha!; and Five Thousand

($5,000.00) dollars each to Prisoners R. and S. Thorne against Assistant Warden Byargeon. Warden Maggio was found not to be liable in all four cases and Sergeant Lemoine was found by the jury not to be liable to Mrs. Thorne.

All defendants found to be liable filed motions in a timely manner for new trial and in the alternative for a judgment not withstanding the verdict on the same grounds which had been raised by their motion for directed verdict plus quantum. These motions were denied, except as to a new trial on the quantum in Mrs. Thorne's case, in which Chief Judge Parker recommended a remitature to five thousand ($5,000.00) dollars because only her First Amendment rights were violated. Mrs. Thorne refused remitature and another jury trial was held on quantum in Mrs. Thorne's case. The jury awarded her five thousand ($5,000.00) dollars. The Thornes made no motions for directed verdict or any post judgment motions in any of the four cases. On Motion by the Thornes' attorney, fees were awarded after opposition was filed and without a contradictory hearing by Chief Judge Parker.

All defendants who were held liable filed a timely appeal to the United States Court of Appeals for the Fifth Circuit. The Thornes filed Cross-Appeals on the quantum awarded to Mrs. Thorne. The United States Court of Appeals held that state prisoners do not have a First Amendment right to associate on a face-to-face basis with their family and friends and that Mrs. Thorne had no such First Amendment right. The Fifth Circuit held that Mr. Thorne's Fourth Amendment rights were violated be-

cause the prison policy violated the Fourth Amendment and no reasonable suspicion existed as to Mr. Thorne. However, Major Jones, Captain Tillary, and Lieutenant Rachal were entitled to good faith immunity against money damages. All judgments in the United States District were reversed and the cases were remanded with instructions. The Thornes petitioned the Appeals Court for a rehearing and a rehearing en banc which were denied.

It is the opinion of the Fifth circuit from which Mr. Thorne seeks a writ of certiorari to This Honorable Court.

The Fifth Circuit found that Major Jones, Captain Tillary, and Lieutenant Rachal had violated Mr. Thorne's Fourth Amendment right to be free from unreasonable searches. It is from this finding of liability which Major Jones, Captain Tillary, and Lieutenant Rachal seek cross-petition for writ of certiorari to This Honorable Court.

ARGUMENTS FOR ALLOWANCE OF THE CROSS-PETITION FOR WRIT

The issue raised in this cross-petition for writ of certiorari, like those raised in the petition for writ of certiorari, are of paramount interest to all those who have the responsibility of running and maintaining this nation's prisons and jails. This cross-petition for writ of certiorari raises the issue of the extent and degree to which the Fourth Amendment applies to those who are visiting on the grounds of a state penal enclave. This issue has never been dealt with by This Honorable Court. The importance of this question of Federal law is self-evident. Contraband is one of, if not the most, troublesome prob-

lems faced by prison administrators and employees. A major source of this contraband is through visitors and employees. Prison and jail administrators need a means through which to counteract this flow of contraband.

This Honorable Court has specifically held that the policies and practices within prisons and jails are to be judged by a standard of reasonableness. This is true whether the policy or practice affects a prisoner, pretrial detainee, or visitor. See: *Block v. Rutherford*, ____U.S. ____, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984) and *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The lower federal courts, however, either have refused to follow or have avoided this standard of reasonableness when applied to searches of visitors, choosing rather to impose their own standards of reasonable suspicion on prisons and jails. See: *Thorne v. Jones*, 765 F.2d 1270 (5th Cir., 1985), *Blackburn v. Snow*, 771 F.2d 556 (1st Cir., 1985), *Hunter v. Auger*, 627 F.2d 668 (8th Cir., 1982) and *Security and Law Enforcement Employees District Counsel 82 v. Carey*, 787 F.2d 187 (2nd Cir., 1984) The Fifth Circuit in the instant case has even created a ban to strip search visually a visitor who has specifically agreed to submit to be searched. *Thorne v. Jones*, supra., at 1276-1277.

The prison policy and practice at stake in the instant case is one in which the visitor is asked to submit to a purely visual body search. If the visitor refuses, then the visitor is escorted from the grounds. If the visitor consents to the purely visual body search, it is conducted before a limited number of prison employees of the same sex in a specially designed room. Whether or not this prison

policy and practice are reasonable under the standards set down by This Honorable Court is a question of first instance before This Honorable Court and a matter of paramount importance to prison and jail administrators, employees, prisoners, pretrial detainees, and visitors. If that policy is not reasonable, a standard to be applied should be specifically set out by This Honorable Court.

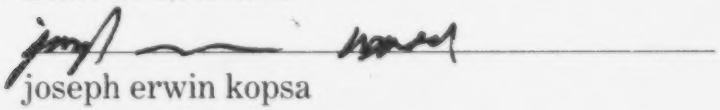
The issues raised in this cross-petition for writ of certiorari are of first instance involving constitutional law and questions of national importance.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this cross-petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana



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CERTIFICATE OF SERVICE

I, joseph erwin kopsa, a member in good standing of the bar of This Honorable Court, certify that, pursuant to the rules of This Honorable Court, a copy of the above and foregoing cross-petition for a writ of certiorari has been served, by mailing the same, properly addressed and postage prepaid, in the United States Mail, on this 19th day of December, 1985, upon the Attorney for the cross-respondents, STEPHEN E. EVERETT, 827 Johnston Street, Alexandria, Louisiana, 71301, by me as counsel of record for cross-petitioners.

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APPENDIX A

THORNE V. JONES, 585 F.SUPP. 910 (M.D. LA, 1984)

PEGGY L. THORNE

V.

MAJOR "A.B." JONES, ET AL.

RICHARD EUGENE THORNE

V.

MAJOR "A.B." JONES, ET AL.

RICHARD JAMES THORNE

V.

ROSS MAGGIO, ET AL.

SCOTT ALLEN THORNE

V.

ROSS MAGGIO, ET AL.

Civ. A. Nos. 81-1033-A, 81-1043-A, 82-1140-A and 82-1141-A.

United States District Court,
M.D. Louisiana.

April 4, 1984.

Prison inmates and their parents brought action against prison authorities challenging strip searches performed before parents could visit their children in prison. Actions had been tried to jury which found in favor of all plaintiffs and against some of the defendants. Defendants who had been found liable by the jury, prison warden and prison officials who conducted the searches, filed motion for judgment notwithstanding the verdict and alternatively a motion for new trial. The District Court, John V. Parker, Chief Judge, held that: (1) Fourth Amendment did not allow prison authorities to demand strip search of inmates' mother, and First Amendment did not allow

them to condition her visitation upon such a search; (2) limited activities of certain prison officials, according the jury the widest latitude, could not in good conscience have caused damage to inmates' mother exceeding $5,000; (3) since there was no probable cause, no reasonable suspicion, no reason at all to suspect inmates' father of attempting to smuggle contraband into prison, reasonable jury could easily conclude that his Fourth Amendment rights were violated by persons who conducted strip search; (4) inmates could recover against prison warden for violation of their associational rights which occurred when their mother's visitation was unreasonably terminated.

Order accordingly.

1. Searches and Seizures Key 7(1)

Basic requirement of Fourth Amendment is that any search must be reasonable. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures Key 3.3(1)

Not all searches must be based on probable cause, and the mere fact that a search is authorized upon basis of an anonymous tip does not invalidate the search. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures Key 3.3

Legitimate governmental interest in conducting search must be balanced against competing privacy interest and courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. U.S.C.A. Const.Amend. 4.

4. Prisons Key 4(7)

Despite difficult and dangerous problems generated by introduction of contraband drugs into maximum security prison, prison officials had not demonstrated that their policies of prevention and detention of contraband would be seriously hampered by first meeting a reasonable suspicion standard, specifically directed to the person to be searched. U.S.C.A. Const.Amend. 4.

5. Prisons Key 4(6)

Visitors at prison had not consented to strip search of their persons at any time prison authorities decided to conduct such a search due to prominent signs at entrance to prison notifying everyone entering that they were subject to routine searches of their persons, property or packages, together with consent forms signed by visitors, in that notices were not notice of strip searches but, rather, clearly envisioned only the "pat-down" searches that were routinely conducted upon every visitor at main gate. U.S.C.A. Const.Amend. 4.

6. Constitutional Law Key 91
Searches and Seizures Key 7(10)

Fourth Amendment did not allow prison authorities to demand strip search of inmates' mother, and the First Amendment's associational rights did not allow them to condition her visitation of her sons upon such a search. U.S.C.A. Const.Amends. 1, 4.

7. Federal Civil Procedure Key 2313

Granting of a new trial, unlike judgment notwithstanding the verdict, lies within sound discretion of court.

8. Civil Rights Key 13.17(6)

Limited activities of certain prison officials in conditioning mother's visit to her inmate sons upon her submission to strip search, according jury the widest latitude, could not in good conscience have caused damage to inmates mother exceeding $5,000.

9. Searches and Seizures Key 7(1)

Reasonable suspicion must be specifically directed to the person to be searched, and the Fourth Amendment does not permit any automatic or casual transfer of suspicion. U.S.C.A. Const.Amend. 4.

10. Searches and Seizures Key 7(10)

Under evidence presented there was no probable cause, no reasonable suspicion, no reason at all to suspect inmates' father of attempting to smuggle contraband into prison, and thus reasonable jury could easily conclude that father's Fourth Amendment rights were violated by persons who conducted strip search of him. U.S.C.A. Const.Amend. 4.

11. Civil Rights Key 13.8(1)

Individuals who conducted strip search of inmates' father before allowing him to visit his sons could not rely upon defense of good-faith immunity in action challenging strip searches of visitors to prison, in that a reasonable correctional officer at prison ought to have been aware that a strip search of a visitor requires that at least some suspicion exist directed toward the visitor personally.

12. Civil Rights Key 13.7

Since correctional officers who conducted strip search of inmates' father knew or should have known that strip search ordered by warden violated constitutional rights of inmates' father, they could not avoid liability in action challenging strip searches of visitors to prison on ground that they were merely following orders. U.S.C.A. Const.Amend. 4.

13. Prisons Key 4(6)

While inmates have no constitutional right, per se, to contact visits, prison authorities ought to have some justification for termination of visits in a particular case.

14. Civil Rights Key 13.4(5)

Where there had been no evidence presented of any misconduct involving one inmate and no confirmation of allegations made about another inmate concerning his receipt of contraband, their associational rights had been violated by unreasonably terminating their mother's visitation after she refused to submit to a strip search, and thus they could recover against prison warden who ordered termination of visitation. U.S.C.A. Const.Amend. 1.

Stephen E. Everett, Alexandria, La., for plaintiffs.

Joseph Erwin Kopsa, J. Marvin Montgomery, Asst. Attys. Gen., Louisiana Dept. of Justice, Baton Rouge, La., for defendants.

John V. Parker, Chief Judge.

These consolidated actions present an array of claims

against state prison authorities regarding strip searches of visitors to the Louisiana State Penitentiary at Angola. Two of these actions are brought by prison inmates and the other two by their mother and father respectively. The actions have been tried to a jury which found in favor of all plaintiffs and against some of the defendants. All defendants who have been found liable by the jury have filed a motion for judgment notwithstanding the verdict and alternatively a motion for a new trial. The motion has been orally argued and extensively briefed by both sides.

While there are many substantial issues in this case, it is important at the outset to point out that the validity of Angola's policies regarding the circumstances under which a visitor to the institution may be strip searched is *not* at issue. These complaints originally attacked the policy promulgated by the prison authorities and sought declaratory and injunctive relief against its application. Plaintiffs have, however, abandoned any attack upon the prison policy, per se, and these cases are restricted to examination of the reasonableness of the actions of the prison authorities in these particular cases only. All complaints allege deprivation of constitutional rights under color of state law in violation of 42 U.S.C. § 1983 and jurisdiction under 28 U.S.C. § 1343(3).

The Louisiana State Penitentiary at Angola is the largest maximum security prison in the nation. It houses nearly five thousand adult felons and consists of a main prison which holds some twenty-two hundred inmates and a series of outcamps, each housing one hundred to six hundred or seven hundred inmates, sprawled across some eighteen thousand acres of remote West Feliciana Parish

hills. The smuggling of contraband into the prison, including money, weapons, alcohol, and narcotics is an ever present and serious security problem. Face to face or contact visits with inmates present an obvious opportunity for the smuggling of contraband. The contact visits serve a beneficial purpose both to the inmates themselves and to administration and security of the prison, and the prison authorities encourage such visits whenever possible. While facilities for contact visits do not exist at every camp within the prison, inmates in areas lacking such facilities are frequently transported by the prison to other areas for that purpose. Inmates nominate visitors and only persons whose names appear upon an approved visitor list may visit an inmate. Each visitor is required to submit background information in writing to the prison authorities prior to visitor approval, and the form, signed by each visitor, declares prominently immediately above the signature line:

> I HEREBY AGREE TO A PERSONAL SEARCH BY SECURITY PERSONNEL OF THE LOUISIANA STATE PENITENTIARY WHILE ON PRISON GROUNDS.

Plaintiffs Richard Thorne (the father) and Peggy Thorne (the mother) each executed such a form.

A memorandum dated November 8, 1978 from legal counsel for the Department of Corrections addressed to all wardens and superintendents was introduced into evidence as Exhibit P-1. It provides:

> In order to preserve our rights to search visitors, vendors, and employees, signs must be posted at all entrances containing language generally conforming to the following:

> "All persons entering upon these grounds are subject to routine searches of their person, (sic) property, or packages."
>
> Please note that unless there is a warrant, you cannot force a non-employee to submit to a search, but you can bar them from the institution. Strip and body searches should be conducted only after following the same procedures set forth for inmates in Dept. Reg. #30-25.

In accordance with the quoted memorandum, prominent signs are posted at the main entrance to the prison so stating. All visitors to Angola are subjected to a "pat-down" search upon arrival at the main gate; that is, a correctional officer of the same sex as the visitor moves his or her hands over the visitor's body including arms and legs, but there is no removal of clothing. All money and other contraband must be surrendered at the main gate. Visitors are transported by prison bus to the visiting facility at the particular camp to be visited and are transported by the same bus back to the main gate upon conclusion of the visit.

The evidence establishes that all inmates are subjected to strip searches at the conclusion of every contact visit. "Strip search" is defined by departmental regulation Number 30-25 as:

> A *strip search* is a purely *visual* search of an inmate/student's body and does *not* involve the touching of the inmate/student by department employees. Limited manual opening of a body cavity, for example spreading the lips of the vagina or the cheeks of the buttocks, is permitted; however, the manual manipulation *must* be done by the inmate/student. The

strip search does not involve probing inside the cavity.

Probing of body cavities is permitted only by qualified medical personnel.

Since this is a motion for judgment notwithstanding the verdict the court must examine all the evidence, drawing all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the motion may be granted. If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. *Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir.1976). Accordingly, the evidence in each case will be reviewed. These cases were consolidated for trial, and all the evidence was received at the same time so that there is no precise delineation as to the evidence offered in each case. The evidence will be summarized for each individual case.

I
THE FACTS

(Mrs. Peggy L. Thorne)

Mrs. Thorne has sued Warden Ross Maggio, Major Travis Jones, who was the commander of Camp D where her son Scott Thorne was incarcerated, and Captain Alvin Ray Whistine, who was a shift commander at Camp D. Warden Maggio was made a defendant in all four cases and the jury returned a verdict in his favor in all four

cases.[1] Plaintiffs have made no complaint about these verdicts in favor of the warden. The jury found in favor of Mrs. Thorne and against Major Jones and Captain Whistine in the amount of $15,000.

In late November 1981, Captain Whistine was informed confidentially by an inmate that another inmate was receiving contraband in legal mail sent from his attorney's office and that inmate Scott Thorne was receiving narcotics through the visiting room at Camp D on a regular basis, probably from his mother. Captain Whistine reported this tip to Warden Byargeon because Captain Jones was absent at the time. Warden Byargeon instructed Captain Whistine to put a mail watch on the mail of the one inmate and to notify all shifts that when Mrs. Thorne came to visit Scott Thorne, "that before she could

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[1] In their brief defendants argue that because Warden Maggio on the witness stand, "admitted against his own interest that he issued all the orders in these consolidated cases which his subordinates are required to carry out," the verdict in favor of the warden and against his subordinates is somehow inconsistent and the latter should be set aside. While it is correct that at the trial Warden Maggio magnanimously offered to assume responsibility for all actions taken in these cases by all correctional officers, the evidence indicates that Assistant Warden H.D. Byargeon, assistant warden for security, actually issued the order to search Mrs. Thorne, the order to search Mr. Thorne, the order to deny Mrs. Thorne visiting privileges with her son Scott Thorne, and the order to deny Mrs. Thorne visiting privileges in toto. There is evidence which a reasonable jury could believe that Warden Maggio's information regarding these cases came mostly from his attendance at the trial and hearing the evidence and that, while he now approves of the actions taken by his staff, he was not personally involved at the time those actions were taken. Accordingly, had plaintiffs' moved for a judgment notwithstanding the verdict as to the warden, the court would have denied it.

visit she was to be requested that she be strip searched." Captain Whistine informed Major Jones of the warden's order and of the information that he had received from the confidential informant. A few days later (the evidence is not clear as to whether this was before or after Mrs. Thorne came to visit) the other inmate named by the confidential informant was caught receiving narcotics in mail ostensibly from his attorney. . .jor Jones, Captain Whistine and Warden Byargeon, among others, were all aware of that development.

Lieutenant Faren Rachal who was a corrections lieutenant at Camp D testified, when called as an adverse witness, that he received information at some unspecified time from an inmate that Scott Thorne was receiving contraband regularly through the visitors building. Later, when called on direct, he expanded his source to include two different inmate confidential informants. In any case he did not act immediately upon the information because it was his opinion that one can not always rely upon information received from inmates—they sometimes lie. Lieutenant Rachal did eventually report this information to Captain Clovis Tillary who was a corrections captain at Camp D. Captain Tillary testified that he tried to check out the tip but that he "never came up with anything concrete."

On December 3, 1981, Mrs. Thorne arrived at the front gate at Angola to visit her son Scott, as she had been doing regularly for several years. Each inmate is allowed two visits per month and a summary of visitors cards introduced by defendants shows that from January through November 1981 Mrs. Thorne made every authorized visit

to Scott Thorne except three; she made a total of nineteen visits during that period of time. Mrs. Thorne produced her visitor's card and signed up to visit Scott Thorne, underwent the usual "pat-down" search and boarded the bus for Camp D. Personnel at the front gate notified Major Jones by telephone that Mrs. Thorne was on the way to Camp D and Major Jones contacted Warden Byargeon with that information. Warden Byargeon instructed Major Jones to strip search Mrs. Thorne before permitting her to visit. Major Jones arranged for female security guards to be available for that purpose and informed his staff of the warden's order. When Mrs. Thorne arrived at Camp D, she was informed by Captain Whistine that she would have to be strip searched before visiting her son. Mrs. Thorne emphatically refused to consent to such a search. This information was reported to Warden Byargeon who instructed Major Jones to personally escort her to the front gate, which he did.

On December 8, 1981, Warden Byargeon issued a directive, signed by him, which removed Mrs. Thorne from the approved visiting list of inmate Scott Thorne. This directive noted "This action is being taken due to an incident that occurred on December 3, 1981, in which Mrs. Thorne refused to be shaken down." (Prison slang for strip search) On December 11, 1981, Warden Byargeon issued an additional directive that Mrs. Thorne, "is to be removed from all visiting lists." From that date to the date of the jury's verdict, Mrs, Thorne was not allowed to visit either of her inmate sons.

(Mr. Richard Eugene Thorne)

Mr. Thorne has sued Major Jones, Captain Tillary,

the corrections captain, Lieutenant Rachal, the corrections lieutenant, and Sergeant Ronald Lemoine, who was also a correctional officer assigned to Camp D. The jury returned a verdict in favor of Mr. Thorne and against Major Jones, Captain Tillary and Lieutenant Rachal in the amount of $10,000. The verdict was in favor of Warden Maggio and Sergeant Lemoine.

On December 4, 1981, the day following Mrs. Thorne's thwarted visit, Mr. Thorne arrived at the front gate to visit Scott Thorne. He underwent the "pat-down" search and boarded the bus for Camp D. Again Major Jones was notified that Mr. Thorne was on the way, and again Major Jones reported that information to Warden Byargeon who ordered Major Jones to conduct a strip search of Mr. Thorne. Upon arrival at Camp D Mr. Thorne was informed that he would not be permitted to visit Scott Thorne unless he was strip searched. Mr. Thorne agreed to the search and was taken into a private room where Captain Tillary, Lieutenant Rachal and Sergeant Lemoine conducted the search. Mr. Thorne removed all of his clothing, his naked body was visually observed, and his clothing was searched by the corrections officers. No contraband was found, and Mr. Thorne was allowed to visit. He has been permitted to visit both inmate sons without event since that time.

The visitors card introduced by the defendants shows that from January through November 1981, Mr. Thorne had visited Scott Thorne only four times, hardly a regular visitor.

Mr. Thorne is a retired (since November 1973) Air Force non-commissioned officer who is now employed by

Dressler Industries in the Alexandria, Louisiana area. Mrs. Thorne is employed as a legal secretary and during her husband's military service was employed as a civilian employee at various military bases where Mr. Thorne was stationed. Both held military security clearances; neither has ever been convicted or even arrested for any criminal offense. No person associated with the penitentiary conducted any additional investigation into the allegations made by the inmate confidential informant, and no background investigation of Mr. and Mrs. Thorne was conducted prior to ordering the searches.

(Scott Thorne and Richard James Thorne)

The inmate sons sued Warden Maggio and Assistant Warden Byargeon. In each case the jury verdict was in favor of the plaintiff and against Warden Byargeon only, in the amount of $5,000.

The evidence offered by the defendants indicated that Scott Thorne was convicted of armed robbery and escape from DeQuincy (a first offender institution) and that he has been in Angola since April 1979. In late 1979, Scott Thorne received a disciplinary report involving contraband marijuana located in his cell.

Richard James Thorne was convicted of burglary, and while at DeQuincy he received a disciplinary report involving contraband drugs. He was transferred to Angola in December 1978, he was paroled, his parole was revoked, and he re-entered Angola in November 1981.

There is no evidence that either disciplinary report played any part in the orders regarding the strip searches or in deleting Mrs. Thorne from the visitors list.

After Mrs. Thorne was deleted from the visitors list, both sons have been permitted telephone calls several times a week and communication by mail with her.

II
THE LAW

These cases present clear clashes between the First Amendment's guarantee of freedom of individual association and the Fourth Amendment's right to be free of unreasonable searches with the vital interests of the prison authorities in internal security of the institution. It should be noted that the four cases involve three disparate claims: that of Mrs. Thorne of conditioning her visits with her sons upon an alleged unreasonable strip search, that of Mr. Thorne for being subjected to an alleged unreasonable strip search, and that of the inmate sons for the alleged unreasonable termination of their mother's visitation privileges with them.

Appropriate here are the comments of Justice Rehnquist in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979):

> There was a time not too long ago when the federal judiciary took a completely "hands-off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands-off" attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the min-

> utiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

99 S.Ct. at 1886.

In *Bell v. Wolfish*, the Court, assuming, but not deciding, that inmates of a penal institution retain some Fourth Amendment rights upon commitment, approved the practice of requiring all inmates, including pretrial detainees, to expose their body cavities for visual inspection as part of a strip search conducted after every contact visit with a person from outside the institution. The court specifically noted that the Fourth Amendment prohibits only unreasonable searches and commented:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against

> the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

99 S.Ct. at 1884.

In *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir.1983), the Seventh Circuit commented that strip searches involving the visual inspection of the anal and genital areas are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission. . . ." 723 F.2d at 1272. In other words, we deal here with the ultimate governmental intrusion. Balanced against the prison's imperative need for internal order and security, which is jeopardized by the smuggling of contraband, is the established principle that searches of the person are generally impermissible absent a search warrant, which issues only on probable cause. E.g., *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). While there is ample authority to support such searches of inmates of penal institutions for the purpose of maintaining the integrity and security of the institution, *Bell v. Wolfish*, *supra*; *Arruda v. Fair*, 710 F.2d 886 (1st Cir.), *cert. denied*. ___U.S. ___, 104 S.Ct. 502, 78 L.Ed.2d 693 (1983); *Daugherty v. Harris*, 476 F.2d 292 (10th Cir.1973), *cert. denied*, 414 U.S. 872, 94 S.Ct. 112, 38 L.Ed.2d 91 (1973); *Hodges v. Klein*, 412 F.Supp. 896 (D.N.J.1976); *Bijeol v. Benson*, 404 F.Supp. 595 (S.D.Ind.1975), an entirely different picture is presented when, as here, prison authorities impose such a personal intrusion upon free citizens who are merely visitors to the institution.

The defendants correctly point out that neither the Supreme Court nor the Fifth Circuit has yet spoken to this precise issue, although there is Fifth Circuit authority regarding body searches, particularly at border stations.

[1-3] The basic requirement of the Fourth Amendment is that any search must be reasonable. *See Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Not all searches must be based upon probable cause, *see Bell v. Wolfish, supra; United States v. DeGutierrez*, 667 F.2d 16 (5th Cir. 1982), and the mere fact that a search is authorized upon the basis of an anonymous tip does not invalidate the search, see *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The legitimate governmental interest must be balanced against the competing privacy interest and, "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 99 S.Ct. at 1884.

The Fifth Circuit has concluded that strip searches by customs officials of persons entering the country at border points may be authorized upon a less than probable cause standard of "reasonable suspicion." *See United States v. Smith*, 557 F.2d 1206 (5th Cir.1977), *cert. denied*, 434 U.S. 1073, 98 S.Ct. 1259, 55 L.Ed.2d 777 (1978); *United States v. Himmelwright*, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977); *Perel v. Vanderford*, 547 F.2d 278 (5th Cir.1977); *United States v. Love*, 413 F.Supp. 1122 (S.D.Tex.) *aff'd*, 538 F.2d 898 (5th Cir)., *cert. denied*, 429 U.S. 1025, 97 S.Ct. 646, 50 L.Ed.2d 628 (1976). In *United States v. Afanador*, 567 F.2d 1325 (5th Cir.1978), the court stipu-

lated what is meant by a "reasonable suspicion" sufficient to authorize a strip search: "Lest there be any doubt, we state here that 'reasonable suspicion' must be specifically directed to the person to be searched." 567 F.2d at 1331.

Both sides in this case cite *Hunter v. Auger*, 672 F.2d 668 (8th Cir.1982), which is the only federal case which we have found dealing specifically with the standard to be applied for strip searching of visitors to penal institutions. *See also Commonwealth v. Lapia*, 311 Pa.Super. 264, 457 A.2d 877 (1983) (citing *Hunter v. Auger*). In *Hunter*, the Eighth Circuit, relying largely upon the "reasonable suspicion" standard adopted by the Fifth Circuit for border searches, concluded that this standard should be used to decide when prison visitors could be subjected to strip searches. The court concluded that an anonymous uncorroborated tip was so lacking in reliability that it could not justify the degree of intrusion which is involved in a strip search of a visitor. Plaintiffs urge that the standard applied in *Hunter v. Auger* should be applied to this case, and the defendants argue that the Eighth Circuit is in error and that the decision should be ignored. Alternatively, the defendants argue that the circumstances of these cases meet the reasonable suspicion test.

It should be noted that the Eighth Circuit in *Hunter v. Auger* considered plaintiffs who actually were strip searched and other plaintiffs, like Mrs. Thorne, who declined to submit to the search and were denied visitation privileges. The court considered all of these claims as representing Fourth Amendment violations. With deference to the circuit court, it is difficult for me to see how

a Fourth Amendment claim can arise in a situation where there has been no actual search. Claims of Mrs. Thorne, like the unsearched plaintiffs in *Hunter v. Auger*, are more properly considered as violations of First Amendment associational rights; that is to say, Mrs. Thorne's First Amendment associational rights with her sons were conditioned upon an unreasonable strip search, and her claim involves the First, not the Fourth, Amendment.

[4] It cannot be disputed that a prison setting is unique. There are, nevertheless, some similarities in regard to persons entering the United States through a customs port of entry and visitors to penal institutions. Introduction of contraband into either has serious consequences, although the consequence in prison might be the more severe. A search of baggage, hand-bags and parcels at ports of entry or the front gate of a prison, routinely conducted upon all persons entering, is clearly reasonable and justified by the legitimate governmental interests involved; the invasion of privacy is relatively slight when balanced against the important mission of preventing smuggling of contraband. Considering the peculiar security problems of prisons, even the "pat-down" search of all visitors to those institutions may well be squared with the Fourth Amendment. The ultimate intrusion, however, the strip search, cannot be conducted at will upon prison visitors, as the prison authorities themselves recognized in the 1978 memorandum quoted herein. While we are fully cognizant of the difficult and dangerous problems generated by introduction of contraband drugs into Angola, the prison officials have not demonstrated that their efforts at prevention and detention of contraband

would be seriously hampered by first meeting a reasonable suspicion standard, "specifically directed to the person to be searched." *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir.1978). Where the general rule is that a search of the person may be conducted only with a warrant issued upon probable cause, *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Fourth Amendment must require at least reasonable suspicion for the warrantless strip searching of free people. I conclude that the Fifth Circuit reasonable suspicion standard for strip searches at ports of entry should also apply to visitors at penal institutions, such as Angola.

[5] The defendants insist that the prominent signs at the entrance to the prison notifying everyone entering that they are subject to routine searches of their persons, property or packages (quoted above), together with the consent forms signed by Mr. Thorne and Mrs. Thorne, indicate that these visitors had consented to a strip search of their persons at any time the prison authorities decided to conduct such a search. The same proposition was rejected by the court in *Hunter v. Auger*, *supra*, and it clearly can not be sustained. Exhibit P-1, quoted above, itself indicates that these notices are not notice of strip searches because it specifically states, "Please note that unless there is a warrant, you can not force a non-employee to submit to a search, but you can bar them (sic) from the institution. Strip and body searches should be conducted only after following the same procedures set forth for inmates in Depart.Reg. #30-25." While Mr. Thorne and Mrs. Thorne may have consented to the "pat-down" search at the front gate, which they do not chal-

lenge, neither has consented to a strip search, and the prison authorities, under the Fourth Amendment, cannot demand a strip search at will of all visitors. The prominent signs at the entrances and the consent forms signed by visitors clearly envision only the "pat-down" searches that are routinely conducted upon every visitor at the main gate.

The Verdict in Mrs. Thorne's Case

The evidence in this case establishes unequivocably that the searches of Mr. and Mrs. Thorne were ordered by Warden Byargeon who did not testify at the trial. The evidence, taken fairly, indicates that Warden Byargeon immediately authorized such a search after receiving a report from Captain Whistine of an uncorroborated tip from a confidential inmate informant. There is evidence that the inmate's information was subsequently confirmed as to the inmate who received contraband through his legal mail. The evidence is also quite clear, however, that no attempt was made to investigate the background of these visitors prior to Mrs. Thorne's arrival at the prison, several days after the initial order to conduct the strip search was issued. Although the defendants produced evidence that both Scott Thorne and his brother, Richard James Thorne, had received disciplinary reports relative to contraband drugs, both of which were several years old, there is no evidence that this information was relied upon by Warden Byargeon in authorizing either strip search. Neither is there any evidence that the defendants who actually conducted and were involved in the strip search or attempted strip search were aware of that information. Accordingly, the evidence is not over-

whelming that the order to conduct a strip search of Mrs. Thorne was predicated upon reasonable suspicion. On the contrary, a reasonable jury could conclude from the evidence that Warden Byargeon's order was not based upon reasonable suspicion.

Following oral argument and post-argument brief, counsel for defendants has called attention to an as yet unpublished state court decision, *State v. Kleinpeter*, 449 So.2d 1043 (La.App. 1st Cir.1984). In that case, the prison authorities at Angola received information that an inmate was to receive drugs from a visitor on August 7, 1981. When Kleinpeter, the visitor, arrived, prison officials asked that she submit to a strip search. When she refused, they detained her while they submitted affidavits to an impartial magistrate who authorized the issuance of a search warrant. The state court concluded that there was probable cause for the warrant based upon evidence presented to the judge that on four prior occasions the inmate appeared to be intoxicated following visits from Kleinpeter, that Kleinpeter is from the New Orleans area and the inmate had received a fictious letter post-marked in New Orleans which contained hashish, that the unnamed tipster claimed to have overheard a conversation of the inmate himself, that the informant had given reliable information in the past, and that Kleinpeter was the only visitor requesting to see the inmate on August 7, 1981. As noted, the court concluded that the search warrant was based upon probable cause and that Kleinpeter was properly convicted for attempting to smuggle the contraband which was found upon her body. The case does not help the cause of the defendants be-

cause it shows that, as to at least one visitor, the prison authorities had the time and facilities to submit a request for and to obtain a search warrant based upon probable cause. I do not suggest that the *Kleinpeter* case indicates that warrants for the strip searching of visitors should be required in all cases, but clearly the lesser standard of reasonable suspicion, applied to Mrs. Thorne, is proper.

[6] It is significant, however, that Mrs. Thorne was not actually searched. Accordingly, she has suffered no Fourth Amendment violation. Her claim is a First Amendment associational right. Her visitation privileges with her two inmate sons were predicated upon an unreasonable search and seizure. The evidence is clear that Warden Byargeon removed Mrs. Thorne from the visitors list because she refused to agree to be strip searched at will by the prison authorities. The Fourth Amendment does not allow the prison authorities to demand such a search, and the First Amendment does not allow them to condition her visitation upon such a search. Clearly the prison authorities have the duty and responsibility of maintaining order and of prohibiting the smuggling of drugs and other contraband into the institution, but they may not at will conduct such intrusive searches upon the bodies of visitors to the institution nor condition visitation upon consent to such searches. A reasonable jury could well conclude that Mrs. Thorne's First Amendment rights have been violated. Those rights were most significantly violated by Warden Byargeon when he issued the orders terminating her visitation, not only with her son Scott, about whom there was at least a suspicion, but also with her son Richard James, whose name was never

mentioned in connection with this incident. Warden Byargeon was not named as a defendant in Mrs. Thorne's suit, and there is no evidence indicating that Major Jones or Captain Whistine had any participation in the issuance of the directives several days later that terminated Mrs. Thorne's visitation. Major Jones and Captain Whistine simply asked her whether she would consent to a search, and, upon her refusal, Major Jones escorted her from the institution. While Major Jones and Captain Whistine cannot be held for Warden Byargeon's subsequent actions, there is evidence that both participated in the violation of her First Amendment rights on the date of her visit. Both were aware of the information upon which Warden Byargeon based his order to strip search Mrs. Thorne. Both were aware, or should have been aware, that the prominent posters and signed consent forms did not extend to strip searching visitors. As reasonable correctional officers both should have known that visitation rights cannot be conditioned upon the ultimate intrusion of a strip search where there is no reasonable suspicion directed to the individual to be searched.

Defendants have pleaded the qualified immunity defense. For reasons stated under the discussion of Mr. Thorne's case, *infra*, defendants have not established that defense. Accordingly, there can be no judgment notwithstanding the verdict in this case.

[7, 8] Defendants have alternatively moved for a new trial under rule 59 of the Federal Rules of Civil Procedure. One of the grounds stated in the motion is that the verdict is against the weight of the evidence. The granting of a new trial, unlike judgment notwithstanding the

verdict, lies within the sound discretion of the court. *Globe Liquor Co. v. San Roman*, 332 U.S. 571, 68 S.Ct. 246, 92 L.Ed. 177 (1948); *Del Rio Distributing, Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979). The weight of the evidence here is against the $15,000 verdict in favor of Mrs. Thorne. Most of her damage incurred from termination, on a quasi-permanent basis, of her visitation with her sons. The actions of defendants Jones and Whistine simply could not have inflicted $15,000 in damages. Although not controlling in determining whether the jury verdict is excessive, it is of interest that in *Hunter v. Auger*, 672 F.2d 668 (8th Cir.1982), the court approved only nominal awards in favor of visitors who declined to submit to the strip search and were escorted from the prison. Evidence of Warden Byargeon's termination of visitation was relevant to determination of liability in the actions of the sons because Warden Byargeon is a defendant in those actions, and a $15,000 verdict in favor of Mrs. Thorne against him would certainly be within the wide range accorded juries in assessing such intangible damages. It is clear to the court that the jury here awarded Mrs. Thorne the full damages she would have been entitled to receive had Warden Byargeon been a party defendant. For whatever reasons, plaintiff chose not to make him a party in this action. The limited activities of Major Jones and Captain Whistine, according the jury the widest latitude, could not in good conscience have caused damage exceeding $5,000. Accordingly, the motion for new trial will be granted, limited to the amount of damages only, unless plaintiff consents to a remittitur in the amount of $10,000.

The Verdict in Mr. Thorne's Case

[9, 10] The case of Mr. Thorne is different because he was actually searched. His testimony was quite clear that the only reason he permitted the search was that it was made plain to him that he would not be permitted to visit his son unless he allowed it. "Consent" under compulsion is no consent at all, and the state authorities do not seriously argue that Mr. Thorne consented to the search on the day in question. It is significant that Mr. Thorne's name was never mentioned, even in the information from the confidential informant. The evidence offered by the defendants themselves establishes that Mr. Thorne was not a regular visitor, having visited only four times during all of 1981. It will be recalled that the information supplied was that Scott Thorne was receiving drugs regularly through the visiting room, probably from his mother. Since Mr. Thorne was not a regular visitor (his last preceding visit was September 5, 1981), a reasonable jury could conclude that the prison authorities had no information which focused specific suspicion upon him. Reasonable suspicion must be specifically directed to the person to be searched, and the Fourth Amendment does not permit any automatic or casual transfer of suspicion. *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir.1978). Under the evidence presented there was no probable cause, no reasonable suspicion, no reason at all to suspect Mr. Thorne of attempting to smuggle contraband into the prison. Accordingly, a reasonable jury could easily conclude that Mr. Thorne's Fourth Amendment rights were violated by the persons who conducted the search.

As in Mrs. Thorne's case, Warden Byargeon ordered the search but he was not made a party defendant in Mr. Thorne's suit. The individuals conducting the search, Major Jones, Captain Tillary, and Lieutenant Rachal against whom the jury returned a verdict have also pleaded good faith immunity. All argue that *Hunter v. Auger*, 672 F.2d 668 (8th Cir.1982), if that standard is applicable, was not decided until after the search was conducted and that as reasonable correctional officers they should not be held to knowledge that a standard of reasonable suspicion was required for strip searching visitors.

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2739, 73 L.Ed.2d 396 (1982), the Court held that public officials are shielded from liability for civil damages under the good faith immunity defense only insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In *Trejo v. Perez*, 693 F.2d 482 (5th Cir.1982), the Fifth Circuit applied a two-step analysis to the qualified immunity defense. *See also Stokes v. Delcambre*, 710 F.2d 1120 (5th Cir.1983). The initial question required by the court in *Trejo* is: "Was the law clearly established at the time? If the answer to this threshold question is no, the official is immune." *Id.*, at 485. The 1982 Eighth Circuit case does not represent some new, startling or different doctrine. The Fourth Amendment to the Constitution became effective November 3, 1791. The jurisprudence has been consistent that a search of the person ordinarily requires a search warrant based upon probable cause, *see e.g.*, *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and that

a strip search based upon a standard less than probable cause could be undertaken only under the most unusual and compelling circumstances. *See, e.g., United States v. Himmelwright*, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977).

[11] The second question required by the court in *Trejo* is: "If the answer [to No. 1] is yes, the immunity defense ordinarily should fail unless the official claims extraordinary circumstances and can prove he neither knew nor should have known that his acts invaded settled legal rights." 693 F.2d at 485. The defendants have claimed no extraordinary circumstances. In this very case, the attorney for the Department of Corrections advised all wardens and superintendents in 1978 (see Ex. P-1 quoted above) that something more was required for strip searches of visitors than the prominent signs at the front gate of the prison. I conclude that a reasonable correctional officer at the Louisiana State Penitentiary in November 1981, applying the objective test mandated by *Harlow v. Fitzgerald, supra*, ought to have been aware that a strip search of a visitor requires that at least some suspicion exist directed toward the visitor personally. While such an officer might not be fully aware that a "reasonable suspicion" versus some lesser standard is required, every reasonable officer should have been aware that clearly established constitutional rights were violated when there was no reason to suspect that individual was smuggling contraband and when the search was merely at the will of the prison authorities.

[12] Defendant's argument that they were merely following orders is not persuasive either. While it appears that the question of whether a police officer is liable

for arresting a citizen when following the direct orders of his superior is not clear and settled, *Vela v. White*, 703 F.2d 147 (5th Cir.1983) (comparing *Nesmith v. Alford*, 318 F.2d 110 (5th Cir.1963) with *Anderson v. Nosser*, 456 F.2d 835 (5th Cir.1972) (en banc)), the evidence in this case supports the conclusion that the three officers knew or should have known that the strip search of Mr. Thorne ordered by Warden Byargeon violated his constitutional rights. The evidence also supports that conclusion in Mrs. Thorne's case and further supports the conclusions that if the ordered strip search was unreasonable, then escorting her from the prison because of her refusal was also unreasonable. A subordinate at a penal institution ordinarily is in no position to question the order of his superior; indeed, in some instances the safety of the subordinate and others may depend on instant obedience to orders. No such extreme or hazardous situation existed here, however, and the subordinates could at least have questioned the superior's order. A subordinate who without question executes the unconstitutional order of his superior does so at his peril. *See Zarcone v. Perry*, 572 F.2d 52 (2d Cir.1978). Under these circumstances, where a reasonable corrections officer ought to have known that depriving Mrs. Thorne of visitation because of her refusal to be strip searched was a violation of her First Amendment rights and that the strip search of Mr. Thorne was a violation of his Fourth Amendment rights, the defense of "following orders" is not appropriate. Consequently, the defendants have not established the qualified immunity defense in either case. The verdict in favor of Mr. Thorne cannot be the subject of judgment notwithstanding the verdict.

The Sons' Verdicts

[13, 14] As to the Thorne brothers, yet another situation exists. They are, of course, convicted felons, and their rights are substantially curtailed. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). It is clear that for security reasons the penal authorities may even prohibit all contact visits by inmates. *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754 (3d Cir.1979). The state here argues that termination of contact visits was proper because the inmates were permitted to communicate with their mother by telephone and by mail. That argument was made to the jury and rejected by the jury because the prison authorities presented no evidence justifying the termination of contact visits. The prison authorities make these two cases more difficult by insisting that the termination of visitation was predicated not upon any conduct or activities of either of the inmate sons, but solely upon Mrs. Thorne's refusal to be strip searched. The evidence is clear that contact visits with inmates at Angola are the general rule and that they are encouraged by the prison administration for the benefit of both the inmate and the institution itself. While I fully concur that inmates have no constitutional right, per se, to contact visits, *Inmates of Allegheny County Jail v. Pierce*, *supra*, the prison authorities ought to have *some justification* for termination of visits in a particular case. Here there has been no evidence presented of any misconduct involving Richard James Thorne and no confirmation of the allegations made about Scott Thorne. Had the prison authorities produced any evidence indicating that either of the inmates had violated any prison rule or

regulation or otherwise been guilty of any misconduct, then the termination of their visitation privileges could easily be justified. No such evidence was presented to the jury, however, and a reasonable jury could well conclude that the associational rights of the two inmates were also violated by unreasonably terminating Mrs. Thorne's visitation. The verdicts against Warden Byargeon who ordered termination of visitation must stand.

Applying the standard for motions for judgment notwithstanding the verdict of *Burrage v. Harrell*, 537 F.2d 837, 339 (5th Cir.1976), I conclude that the evidence heard by the jury was not overwhelmingly in favor of defendants. Accordingly, the motion for judgment notwithstanding the verdict must be denied in each case.

As to the motions for new trial, the court can find no reason to grant a new trial in any case except that of Mrs. Thorne, limited to the issue of amount of damages, should she decline the remittitur in the amount of $10,000. In each of the other cases the motion for new trial is hereby DENIED.

INJUNCTIVE RELIEF

Plaintiffs originally prayed for injunctive relief, and following the verdict the court directed both sides to brief this issue. Plaintiffs have suggested injunctive relief equivalent to that which would have been appropriate had the state policies on strip searches been considered and found wanting. As noted earlier, all such claims have been abandoned. Under these circumstances the equitable remedy of injunction is not appropriate.

EPILOGUE

Contrary to counsel's cataclysmic predictions in brief, the walls of the state prison will not come tumbling down as a result of confirming the jury's verdicts in this case. Prison officials need not cower in fear and trembling that they are prohibited from taking all necessary measures to exclude contraband. All that prison officials must do is to observe the reasonable rights of citizens who visit the institution. The notion that any visitor may be strip searched at random, simply because he visits a maximum security prison will not wash, and as I have pointed out Exhibit P-1 demonstrates that the prison authorities did not think so, even prior to this litigation. The *Kleinpeter* case, submitted by defendants, shows that in a proper case the prison authorities may obtain a warrant to strip search a visitor and may effectively prosecute the visitor who attempts to smuggle contraband. While it cannot be disputed that incarceration automatically results in diminished constitutional protections, it is also indisputable that a citizen who visits a prison retains all of his constitutional protections—he does not acquire the status of inmate simply by visiting an inmate. In a country where since 1791 the law has proclaimed, "The right of the people to be secure in their persons . . ., against unreasonable searches and seizures, shall not be violated, . . ." no undue impedement is imposed upon the prison authorities by demanding that before they subject a citizen visitor to the ultimate intrusion of a strip search of his body, the authorities be in possession of specific facts pointing to the individual to be searched, facts which constitute reasonable suspicion that the individual may be in possession of contraband. In this court's view the Fourth Amendment will countenance nothing less.

APPENDIX B
THORNE V. JONES, 756 F.2d 1270 (5th Cir. 1985)

PEGGY L. THORNE,
PLAINTIFF-APPELLEE-CROSS-APPELLANT,
V.
MAJOR "A.B." JONES, ET AL.,
DEFFENDANTS-APPELLANTS-CROSS
APPELLEES.
RICHARD EUGENE THORNE,
PLAINTIFF-APPELLEE,
V.
MAJOR "A.B." JONES, ET AL.,
DEFFENDANTS-APPELLANTS.
RICHARD JAMES THORNE,
PLAINTIFF-APPELLEE,
V.
ROSS MAGGIO, ET AL.,
DEFFENDANTS-APPELLANTS.
SCOTT ALLEN THORNE,
PLAINTIFF-APPELLEE,
V.
ROSS MAGGIO, ET AL.,
DEFFENDANTS-APPELLANTS.

No. 84-3339.

United States Court of Appeals,
Fifth Circuit.

July 22, 1985.

Rehearing and Rehearing En Banc
Denied Aug. 23, 1985.

Prison inmates and visitors brought action challenging effected and attempted strip searches of their persons. The United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, 585 F.Supp. 910, entered judgment in favor of plaintiffs, and

defendants appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) inmates had no First Amendment right to physical association with their parents or with anyone else, and therefore strip searches did not violate First Amendment; (2) trial court erred by evaluating First Amendment challenge to strip search and looking beyond the search's reasonableness; (3) strip search of inmates' father was without reasonable suspicion of father as a likely source of inmates' contraband; but (4) individual defendants were entitled to qualified or good-faith immunity from liability for money damages.

Reversed and remanded with instructions.

1. Constitutional Law Key 91
Prisons Key 4(7)

Inmates had no right to simple physical association with their parents or with anyone else grounded in First Amendment; therefore, requirement that inmates' mother submit to strip search before visiting inmates did not violate First Amendment. U.S.C.A. Const.Amend. 1.

2. Prisons Key 13(3)

Security-related decisions of prison officials are to be reviewed only for reasonableness; if the decisions are rational, courts are to look no further.

3. Prisons Key 4(2)

Constitutional challenge to prison requirement that visitors submit to strip searches before visiting inmates was subject to review only for reasonableness; therefore, trial court erred in looking further than reasonableness standard required.

4. Searches and Seizures Key 7(10)

Fact that prison visitor has prior notice that he is subject to search and is given option of leaving prison rather than submitting to search does not render strip search of visitor reasonable as a matter of law.

5. Searches and Seizures Key 7(27)

That inmates' father signed visitor form consenting to strip search and observed warning notices posted at prison gates stating that visitors were subject to strip searches did not as matter of law render father's strip search reasonable under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures Key 7(14)

That a prison informant pointed to inmate's mother as a likely source of her son's contraband did not render subsequent strip search of her husband at prison reasonable. U.S.C.A. Const.Amend. 4.

7. Prisons Key 10

It was not clearly established at time of strip search of visitor that such searches conducted without reasonable suspicion violated the Fourth Amendment; therefore, individual defendants were entitled to qualified or good-faith immunity from liability for money damages in suit challenging the strip search. U.S.C.A. Const.Amend. 4.

Joseph Erwin Kopsa, Asst. Atty. Gen., Baton Rouge, La., for Jones, et al.

Stephen E. Everette, Alexandria, La., for Thornes.

Appeals from the United States District Court for the Middle District of Louisiana.

Before GEE, TATE, and HIGGINBOTHAM, Circuit Judges.

GEE, Circuit Judge:

In these consolidated cases, visitors to and inmates of the Louisiana State Penitentiary at Angola challenge effected and attempted strip searches[1] of their persons.

Facts

Peggy and Richard E. Thorne are the parents of Richard J. and Scott Thorne. The younger Thornes are inmates at Louisiana State Penitentiary (LSP), a maximum security facility for prisoners who pose severe security risks. Both brothers have been disciplined while in prison for possession of contraband drugs. LSP permits "contact" visits between inmates and approved friends and family.

Mr. and Mrs. Thorne visited their sons at LSP. Before being allowed to do so, each was required to sign a form that stated, among other things, "I hereby agree to a personal search by security personnel of the [LSP] while on prison grounds." A large sign prominently posted just outside the front gate of LSP warned, "Beware Notice If you enter the gates of Angola, you consent to a search of your person and property. . . ."

In November 1981, an LSP inmate told Captain

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[1] In a strip search, the naked body of the subject is very thoroughly inspected, but not touched, by prison personnel of the same sex; the search is conducted in private.

Whistine, an LSP shift commander, that another inmate was receiving contraband in his legal mail and that Scott Thorne was regularly receiving narcotics through the visiting room, probably from his mother. Captain Whistine reported this information to Warden Byargeon. On the Warden's instructions, Captain Whistine ordered a mail watch on the first inmate's legal mail and notified all shifts that Mrs. Thorne was to be asked to submit to a strip search before being allowed to visit Scott Thorne.

Contraband was found in the first inmate's legal mail, lending credence to the informant. When Mrs. Thorne next arrived to visit Scott Thorne, Captain Whistine told her that she would have to be strip searched before seeing him. Mrs. Thorne refused, with some heat, to be searched. Escorted back to the front gates of the prison, she departed. The Warden had her name removed from the list of approved visitors to the prison. Mrs. Thorne was thus unable to visit either of her inmate sons.

Mr. Thorne came to visit Scott Thorne the next day. He, too, was told that a strip search would be required before he could visit his son. Mr. Thorne consented to the search. No contraband was found and the visit took place.

All four Thornes, sensitive to their rights as citizens, obtained counsel and brought actions under 42 U.S.C. § 1983 against the Louisiana Department of Corrections and sundry LSP officials alleging that these doings infringed upon rights secured to them by the Constitution of the United States.[2] Mrs. Thorne and her inmate sons as-

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[2] Warden Ross Maggio was a named defendant in each of the four actions. Captain Ray Whistine and Major Travis Jones were addi-

serted violations of alleged first amendment associational rights; Mr. Thorne alleged violation of his fourth amendment right to be free from unreasonable searches. The actions were consolidated and tried to a jury, which found for all of the Thornes as against some (but not all) of the defendants,[3] awarding damages to each.[4] Defendants (referred to collectively as "LSP") moved for judgment notwithstanding the verdict; the trial court denied their motion. 585 F.Supp. 910. From this denial, defendants appeal. We reverse.

Rights of Association Guaranteed by the First Amendment?

Mrs. Thorne and her two inmate sons contended that LSP deprived them of rights of association guaranteed by the first amendment. The trial court agreed, holding that

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tional defendants in Mrs. Thorne's action. Mr. Thorne's action was brought against Major Jones, Captain Clovis Tillary, Lieutenant Faren Rachal, and Sergeant Ronald Lemoine. Richard and Scott sued only Warden Maggio and Assistant Warden Herbert Byargeon. Secretary John King and the Louisiana Department of Corrections were also named defendants; however, the trial court granted the former's motion for a directed verdict and the latter's motion to dismiss.

[3] The jury found for Warden Maggio in each of the four actions, and for Sergeant Lemoine in Mr. Thorne's action. It returned verdicts against the remaining defendants.

[4] Richard and Scott were awarded damages of $5,000 each. Mr. Thorne was awarded damages of $10,000. Mrs. Thorne was originally awarded damages of $15,000. The trial court found this award to be excessive; it granted LSP's motion for a new trial, limited to Mrs. Thorne's damages, when she refused to consent to a remittitur of $10,000. At this second trial, Mrs. Thorne was awarded damages of $5,000. Although Mrs. Thorne made the district court's grant of a new trial on damages the subject of a cross-appeal, we need not, for reasons discussed below, reach this issue.

Mrs. Thorne had a first amendment associational right to visit her sons in prison and that her sons' right to receive her visits was guaranteed by the same amendment. If this holding be error, as LSP contends, the judgments for Mrs. Thorne and her sons cannot stand, for they neither alleged nor proved deprivation of any other constitutional right;[5] it is axiomatic that no recovery may be had under § 1983 absent proof of deprivation of a right guaranteed by the Constitution or laws of the United States. *See Oklahoma City v. Tuttle*, ___U.S. ___, ___, 105 S.Ct. 2427, 2439, 85 L.Ed.2d 791 (1985) (Brennan, J., concurring).

The trial court cited no authority whatever for the proposition that Mrs. Thorne had an absolute right under the first amendment to visit her sons, and we have found little or none.[6] In *Jones v. North Carolina Prisoners' La-*

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[5] It is important to note that these cases do not involve allegations of deprivation of rights without due process of law; the trial court was not called upon to decide the proper measure of procedural protection to be accorded familial visiting rights and did not do so. Accordingly, that question is not before us.

[6] Cases cited by Mrs. Thorne in support of this proposition do not—with one exception—do so. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 477 (1979), involved rights of pretrial detainees, not convicted prisoners; the question of the detainees' constitutional right to contact visits was not before the Court, and it "accordingly, express[ed] no opinion" on it. 441 U.S. at 559 n. 40, 99 S.Ct. at 1885 n. 40. In *Jones v. Diamond*, 636 F.2d 1364, 1377 (5th Cir.1981) (en banc), *cert. dismissed sub nom Ledbetter v. Jones*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1982), we stated, "there is no need to consider whether deprivation of visitation would violate constitutional requisites." *Lynott v. Henderson*, 610 F.2d 340 (5th Cir.1980), makes no mention of the first amendment and flatly states, with abundant supporting citation, that "[c]onvicted prisoners have no absolute constitutional right to visitation." *Id.* at 342. The first

bor Union, Inc., 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), the Supreme Court stated:

> The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implict in incarceration. . . . Perhaps the most obvious of the First Amendment rights that are

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amendment right at issue in *Rudolph v. Locke*, 594 F.2d 1076 (5th Cir.1979), was freedom of expression, not association, *id.*, at 1077. The case did not involve visitation rights. In *Hunter v. Auger*, 672 F.2d 668 (8th Cir.1982), which did, the Court's decision rested on fourth amendment grounds; it did not address first amendment issues. *See id.* at 670 n. 2. the sole authority for the proposition is *McMurry v. Phelps*, 533 F.Supp. 742 (W.D. Louisiana 1982), in which the court stated, without supporting citation, that "basic visitation is a right protected by the First Amendment: freedom of association." *Id.* at 764 *McMurry* is obviously not binding on this Court, and to the extent that it departs from our holding here, we explicitly overrule it.

We note that the Second Circuit has recognized the right of pretrial detainees to contact visits; it has "repeatedly held that *due process* forbids denying detainees the right 'to shake hands with a friend, to kiss a wife, or to fondle a child.'" *Marcera v. Chinlund*, 595 F.2d 1231, 1234 (2d. Cir.1979), *cert. granted and judgment vacated*, 442 U.S. 915, 99 S.Ct. 2833, 61 L.Ed.2d 281 (1979), *quoting Rhem v. Malcolm*, 371 F.Supp. 594, 626 (S.D.N.Y.), *aff'd and remanded on other grounds*, 507 F.2d 333 (2d Cir.1974), *aff'd after remand*, 527 F.2d 1041 (2d Cir. 1975) (emphasis added). It has not, however, extended this right to convicted prisoners. *See Marcera*, 595 F.2d at 1236 n. 7 ("Whatever constitutional right a sentenced offender may have to contact visitation—and we express no view on the issue—is primarily a matter of the Eighth Amendment's prohibition of cruel and unusual punishment"). Further, the continued validity of these cases after the Supreme Court's vacation of *Marcera* is doubtful; neither *Marcera* nor *Rhem* has apparently been followed since. In any event, this Court expressly rejected *Rhem's* right of visitation for pretrial detainees in *Miller v. Carson*, 563 F.2d 741, 748 n. 9 (5th Cir.1977): "We do not hold that contact visitation is a right for all persons presumed innocent by the law."

> necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution.

433 U.S. at 125-26, 97 S.Ct. at 2537-38. This language is itself sufficient to refute the notion that incarcerated prisoners retain any absolute rights of physical association; moreover, we have held "that for convicted prisoners '[v]isitation privileges are a matter subject to the discretion of prison officials.'" *Jones v. Diamond*, 636 F.2d at 1376-77, *quoting McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir.), *cert. denied*, 423 U.S. 859, 96 S.Ct. 114, 46 L.Ed.2d 86 (1975). *See also Block v. Rutherford*, ___ U.S. ___, 104 S.Ct. 3227, 3233, 82 L.Ed.2d 438 (1984) ("There are many justifications for denying contact visits entirely"); *White v. Keller*, 438 F.Supp. 110, 114 (D.Md.1977), *aff'd*, 588 F.2d 913 (4th Cir.1978).

Further, it is extremely doubtful that the rights to visitation asserted by the Thornes are the sort of associational rights protected by the First Amendment. *White v. Keller*, a case with strong parallels to these actions, contains a thoughtful discussion of this issue:

> Freedom of association, as articulated by the Supreme Court, had its genesis in freedom of speech. *NAACP v. Alabama*, 357 U.S. 449, 460 [78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488] (1958). It has always meant the right to associate ideologically: "for the advancement of beliefs and ideas." *Abood v. Detroit Board of Education*, 431 U.S. 209 [97 S.Ct. 1782, 52 L.Ed.2d 26] (1977); *McCrary v. Runyon*, 427 U.S.

160 [96 S.Ct. 2586, 49 L.Ed.2d 415] (1976), *aff'g*, 515 F.2d 1082 (4th Cir.1975); *NAACP v. Alabama*, 357 U.S. at 460 [78 S.Ct. at 1170]. The "right is protected because it promotes and may well be essential to the '[e]ffective advocacy of both public and private points of view, particularly controversial ones' that the First Amendment is designed to foster." *McCrary v. Runyon*, 427 U.S. at 175 [96 S.Ct. at 2597].

As this court sees it the essence of prison visitation is not the ideological association recognized by the courts as protected by the first amendment. Rather, prison visitation raises questions of the right to physical association. The right sought is to see and visit in person with another individual. There may well be a first amendment right to physical association, *see Griswold v. Connecticut*, 381 U.S. 479, 483 [85 S.Ct. 1678, 1681, 14 L.Ed.2d 510] (1965) (right of association includes right to attend a meeting); *see also De Jonge v. Oregon*, 299 U.S. 353 [57 S.Ct. 255, 81 L.Ed. 278] (1937), but if there is, it is because such association is part and parcel of the expression of ideas. For example, the first amendment expressly protects the freedom of assembly, which is patently a right to associate physically. But this freedom must be read in context; it is not simply a right to associate physically; it is a right to associate physically for the purpose of expressing ideas. *See De Jonge v. Oregon*, *supra*. And it is not a right merely to be together, [sic] it is a right to *assemble;* it connotes a gathering, not a visitation. While the argument could be made that it includes all physical associations, since no doubt meaningful, protected ideas might be exchanged on any such occasion, the court is doubtful that the rights of association and assembly are so broad. The history, nature and purpose of the first amendment do not warrant this conclusion. Al-

> though the amendment protects *all* ideas, its essence is political.
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> * * * * * *
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> Thus this court maintains the belief that any first amendment right to mere physical association is so attenuated from the true protections of that amendment as to not be deserving of the usual strictures placed on abridgement of first amendment rights including restriction only by the least drastic means.

438 F.Supp. at 115-16 n. 7 (citations omitted) (emphasis in original); *accord*, L. Tribe, *American Constitutional Law* § 12-23 at 702 (1978) ("What the Court *has* recognized as implicit in the first amendment, and therefore in the liberty secured by the fourteenth, is *a right to join with others to pursue goals independently protected by the first amendment*—such as political advocacy, litigation . . . , or religious worship.") (citations and footnotes omitted; emphasis in original).

We agree with the general thrust of Judge Blair's observations in *White:* such freedoms as the Thornes seek to anchor in the first amendment find their true basis elsewhere, perhaps in the ninth, perhaps simply in the character of our polity as a free society. Each of us, as a citizen of the United States—indeed, to a great degree, even as a person merely present here—enjoys the freedom to stroll where he will, to spend his time with those whom he chooses to befriend, to travel without internal passports, and so on. Whatever is not forbidden on our blessed shores is permitted.

It is one thing, however, to trench upon these general freedoms from being hectored and schoolmarmed; only a rational basis is required to support legislative (or,

in the instance of prisoners, quasi-legislative) restriction of them. It is quite another to make an inroad on matters specifically protected by the Bill of Rights. For such an invasion, more is required. Courts have written much of the history of modern constitutional adjudication in response to the efforts of persons who sought to transpose the activities which they sought to pursue from the first of these areas to the second. *E.g.*, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1972). Some have succeeded; some have not. *White*, discussed above, is such a case; this is another.

[1] Such incarcerated persons as the Thorne brothers maintain no right to simple physical association—with their parents or with anyone else—grounded in the first amendment. Indeed, as the quoted matter from *Jones*, *supra*, indicates, even true first amendment rights are subject to restriction in such circumstances. It is very doubtful, moreover, that even the free citizen enjoys such a first amendment *right* to nonideological association. The freedom to gather to play touch football or to gamble for money stands on a very different footing from a right to hold a political rally or one to assemble to seek redress of grievances. At all events, the claims of the Thorne brothers, whatever their source, to go where they like and to meet with whom they choose have been terminated by a proceeding conducted according to the strictest of due process: a criminal trial.

Restrictions on Prisoners' Rights

Even were we in the presence of a true, first amendment right, the correct standard for review of a restriction placed upon it, derived from *Bell v. Wolfish*, 441 U.S.

520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and, more recently, *Block v. Rutherford*, ___U.S. ___, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984), is whether the restriction in question "is 'reasonably related' to security interests," *Block*, 104 S.Ct. at 3232. If the restriction is reasonably related to legitimate governmental objectives, of which prison security is one, and "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations[,] courts should ordinarily defer to their expert judgment in such matters." 104 S.Ct. at 3232, *quoting Wolfish*, 441 U.S. at 540-41 n. 23, 99 S.Ct. at 1875 n. 23.

In *Block*, pretrial detainees challenged the prison's prohibition of contact visits. The trial court invalidated the prohibition. The Supreme Court reversed:

> [w]hen the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further 'balancing' resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. . . . We hold . . . that the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility.

104 S.Ct. at 3234.

[2, 3] The preeminence of prison security concerns was further emphasized in *Hudson v. Palmer*, ___U.S. ___, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). The *Hudson* Court held that "prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohi-

bition on unreasonable searches does not apply in prison cells. . . ." ___U.S. at ___, 104 S.Ct. at 3202. The Court's reasoning is relevant here:

> The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. The latter interest, of course, is already limited by the exigencies of the circumstances. A prison "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room". . . . We strike the balance in favor of institutional security, which we have noted is "central to all other corrections goals," *Pell v. Procunier*, 417 U.S., [sic] at 823, 94 S.Ct., [sic] at 2804. A right to privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy *always yield to what must be considered the paramount interest in institutional security.*

104 S.Ct. at 3200-01 (citation and footnote omitted) (emphasis added). Taken together, *Hudson*, *Block*, and *Wolfish* indicate unmistakably that security-related decisions of prison officials are to be reviewed only for reasonableness; if the decisions are rational (an exceedingly undemanding standard), courts are to look no further. The trial court here looked further; in so doing, it failed to accord LSP security-related decisions the deference demanded by the Supreme Court.[7]

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[7] *Wolfish*, 441 U.S. at 559 n. 40, 99 S.Ct. at 1885 n. 40, seems to place upon those challenging such decisions the burden of showing the decisions to be irrational or unreasonable. *See Jones v. North*

Mr. Thorne's Fourth Amendment Claim

As the other Thornes were not searched, they have no fourth amendment claims; as Mr. Thorne's visit does not implicate his freedom to associate in order to express ideas, he possesses no colorable first amendment ones. We turn to his fourth amendment claim.

[4] As to it, LSP advances several arguments for reversal. In the first of these, LSP seems to argue that the trial court erred in finding the search of Mr. Thorne unreasonable because the finding was grounded on a theory different from LSP's: that a strip search of *any* prison visitor is reasonable as a matter of law, so long as the visitor has prior notice that he is subject to search and is given the option of leaving the prison rather than submitting to the search.[8] LSP's contention thus appears to be that it was error for the trial court to consider the particular circumstances of Mr. Thorne's search. If this is in fact the contention, it is meritless. In *United States v. Lilly*, 576 F.2d 1240 (5th Cir.1978), a case involving body cavity searches of inmates, we stated,

> Although few searches are more intrusive than a body cavity search, we do not hold that such searches are per se unreasonable. . . . They not only help stem the flow of contraband into, within, and out of pris-

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Carolina Prisoners' Union, 433 U.S. 119, 132, 97 S.Ct. 2532, 2541, 53 L.Ed.2d 629 (1977). This burden could not be met by proof of a less restrictive alternative, *Block*, 104 S.Ct. at 3235 n. 11, for prison officials need not adopt such alternatives. *Id.*

[8] A more reasonable rule might condition *contact* visitation on such a search, permitting non-contact visitation upon its refusal. Even so, we express no opinion on its validity as no such rule is before us.

> ons, but they also have a beneficial deterrent effect. To prove the legal validity of a *particular* body cavity search, however, the government still must show that the search and seizure *in question was reasonable under all the facts and circumstances*. The relevant facts and circumstances will vary from case to case. In the prison context, however, the government always must show that a legitimate penological need necessitated the search, that the need could not have been satisfied by a more narrow means, and that the search and any consequent seizure were conducted in a reasonable manner. Depending on the facts of a particular case, proof of certain other factors may be necessary to prove reasonableness.

576 F.2d at 1246 (citations omitted) (emphasis added). Although *Lilly* dealt with prison inmates rather than prison visitors, it would be anomalous indeed to accord the former class greater protection from unreasonable searches than the latter. Under *Lilly*, inquiry, must be made into the reasonableness of a *particular* inmate search; the reasonableness of particular visitor searches must be determined in the same manner. *See Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir.1982) ("To justify the strip search of a particular visitor under the reasonable suspicion standard, prison officials must point to specific objective facts and rational inferences that they are entitled to draw from those facts. . . ."); *Security and Law Enforcement Employees, District Council 82 v. Carey*, 737 F.2d 187, 205 (2d Cir.1984) (adopting *Hunter* reasonable suspicion standard for strip searches of prison employees); *Giles v. Akerman*, 746 F.2d 614, 617 (9th Cir.1984), *U.S. appeal pending* (adopting reasonable suspicion standard for strip searches of arrestees charged

with minor offenses). There being no authority for the proposition that strip searches of prison visitors are *per se* reasonable, LSP's assignment of error must be rejected. It was not error for the trial court to look to the particular facts of Mr. Thorne's search to determine its reasonableness.

[5] LSP next argues that the trial court erred in finding Mr. Thorne's search unreasonable under the fourth amendment, either because Mr. Thorne consented to his search or because he waived his fourth amendment rights when he entered the prison. LSP locates this consent or waiver in the visitor form signed by Mr. Thorne and in the warning notices posted at the prison gates. If accepted, this argument would render reasonable a strip search of any such prison visitor; as discussed above, such at-will, random searches are not reasonable under the Fourth Amendment. The argument must therefore fail. *See Carey*, 737 F.2d at 202 n. 23 (rejecting similar "consent" argument). *United States v. Sihler*, 562 F.2d 349 (5th Cir.1977), the sole authority cited by LSP, does not compel a different result. In *Sihler*, we upheld the search of a prison employee's brown paper lunch bag on the ground of consent, both explicitly given by the employee and inferred from a sign at the prison gates warning that all persons entering would be subject to *routine* searches. Strip searches are not "routine," they cannot be equated with the lunch bag search in *Sihler*, which thus provides no support for LSP's contention. There being no support for the contention, it is clearly meritless. The trial court did not err in rejecting LSP's "consent" defense.

[6] Finally, LSP argues that the search of Mr.

Thorne was justified by "reasonable suspicion," and that the trial court erred by holding the search unreasonable under this standard. The argument is untenable. "'[R]easonable suspicion' must be specifically directed to the person to be searched. . . . [T]he fourth amendment does not permit any automatic or casual transference of 'suspicion.'" *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir.1978). "To justify the strip search of a particular visitor under the reasonable suspicion standard, prison officials must point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience. Inchoate, unspecified suspicions fall short of providing reasonable grounds to suspect that a visitor will attempt to smuggle drugs or other contraband into the prison." *Hunter*, 672 F.2d at 674 (citations omitted). Here, no objective fact pointed to Mr. Thorne as a probable smuggler of drugs into LSP. That an informant pointed to Mrs. Thorne as a likely source of Scott Thorne's contraband does not suffice, under *Afanador*, to justify search of her husband. It is common knowledge that husbands and wives do not concur in all things. LSP offers no other facts on which reasonable suspicion of Mr. Thorne could have been grounded; it is thus clear that the trial court correctly found Mr. Thorne's search to have been without reasonable suspicion, and therefore in violation of the fourth amendment.

Qualified Immunity

[7] Finally, LSP contends that the trial court erred in rejecting the individual defendants' defenses of qualified, or "good faith," immunity from liability for money

damages. Under *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982),

> officials 'are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' No other 'circumstances' are relevant to the issue of qualified immunity.

Davis v. Scherer, ___U.S. ___, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139 (1984) (citations omitted), *quoting Harlow* at 818 (footnote deleted). LSP must prevail on this issue if it was not clearly established in December 1981 that strip searches of prison visitors conducted without "reasonable suspicion" violated the fourth amendment. We conclude that it was not.

First, at that time only one district court had yet ruled on the issue, *Black v. Amico*, 387 F.Supp. 88 (W.D.N.Y.1974) (applying "real suspicion" test to visitor strip search); and in 1979, in *Wolfish*, the Supreme Court had upheld routine strip searches of inmates. Second, in *Carey*—a 1984 decision on 1979-80 events—the Second Circuit affirmed prison officials' qualified immunity from damage liability for unconstitutional strip searches of prison employees on the ground that "[t]hese officials operated in an area in which the law was not charted clearly." 737 F.2d at 211.

We agree. The authorities cited in the foregoing section of our opinion make plain that at the time of the search of Mr. Thorne the law in this area was in a state of un-

certainty. Indeed, in our Circuit portions of it become "clearly established" only today.

For the foregoing reasons, we REVERSE the judgments favorable to the Thornes and REMAND with instructions to enter judgment for the defendants.

APPENDIX C
UNITED STATES COURT OF APPEALS
Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 35)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Thorne v. Jones	84-3339	8/23/85	M.D.La., 765 F.2d 1270
Thorne v. Maggio	84-3339	8/23/85	M.D.La., 765 F.2d 1270

APPENDIX D
STATE OF LOUISIANA
DEPARTMENT OF CORRECTIONS

Department
Regulation No.
30-25

CORRECTIONAL SERVICE
STRIP AND BODY SEARCHES

1. *PURPOSE:* To establish the Secretary's policy regarding strip and body searches of inmates/students at facilities within the Department of Corrections.

2. *TO WHOM THIS REGULATION APPLIES:* This regulation is applicable to all personnel in the employ of the Department of Corrections.

3. *GENERAL:* The United States and Louisiana Constitutions prohibit "unreasonable searches". This policy guideline is based on pertinent court decisions regarding strip and body searches. Since a constitutional question is involved, department employees must be especially conscientious about complying with this directive.

4. *DEFINITIONS:* For the purpose of this regulation the following definitions shall be applicable:

A. A *strip search* is a purely *visual* search of an inmate/student's body and does *not* involve the touching of the inmate/student by department employees. Limited manual opening of a body cavity, for example, spreading the lips of the vagina or the cheeks of the buttocks, is permitted; however, the manual manipulation *must* be done by the inmate/

student. The strip search does not involve probing inside the cavity.

B. A *body search* is one in which a probe is made inside the body cavity itself, by qualified medical personnel.

C. A *general search* is a routine search of a large area such as an entire tier or dormitory. During a general search inmate/students may be required to remove their clothing in order that the *clothing only* may be searched.

Should it appear during the course of a general search that probable cause exists to conduct a strip search of particular inmates/students the procedures set forth in Paragraph 5 (D) shall be followed.

D. *Probable cause* is a reasonable ground for suspicion *supported* by *facts* and *circumstances* sufficiently strong in themselves to lead an employee of ordinary caution to believe that an inmate is secreting contraband in a body cavity.

5. *STRIP SEARCH:* A strip search is permitted under the following circumstances:

A. When an individual is entering or leaving the institution; for instance, when an inmate/student is called for a court appearance.

B. After a physical contact visit between the inmate/student and visiting relatives, friends, or attorneys.

C. Before an inmate/student enters a segregation area or following unescorted contact by an inmate/student in segregation with general population inmates. However, a strip search is specifically prohibited when a segregated inmate/student is moved within the segregation area or anywhere within the

institution while the inmate/student is under escort or observation, unless there is *probable cause* to believe that the inmate/student has secreted contraband into a body cavity.

D. In all other circumstances not specifically mentioned above, strip searches may be conducted only upon a *specific* and *particular* showing of probable cause. The details of the probable cause must be recorded in writing and be based upon firsthand knowledge. The record shall include the reasons, circumstances, and results of the search. A copy shall be given to the inmate/student and a copy placed in the inmate/student's institutional record.

E. All strip searches shall be conducted by institutional staff of the same sex as the inmate/student, in a private place, out of the view of others.

6. *BODY SEARCH:* A body search is permitted under the following circumstances:

A. When, as a result of a strip search, the inmate/student appears to be concealing something within a body cavity. For example, if the area is reddened, or if a substance such as vasoline is smeared outside the opening, or if something is bulging or protruding from the opening.

B. If a full body cavity search is to be conducted, it can only be conducted by a physician, a nurse, or a medical technician. It cannot be conducted by a non-medical employee. The inmate/student must be searched in a sanitary manner and in a sanitary location.

C. If an object is protruding from the cavity, a non-medical employee may remove it, provided he/she does not have to probe into the cavity and the object can be removed without harm to the employee or the inmate/student. Otherwise, the extraction

must be done by one of the above-listed medical personnel.

/s/C. Paul Phelps

Secretary of Corrections

(This regulation supersedes Department Regulation 30-25 dated 6/20/78)

APPENDIX E
LOUISIANA DEPARTMENT OF CORRECTIONS

C. Paul Phelps, Secretary of Corrections
P.O. Box 44304
Capitol Station
Baton Rouge, Louisiana
Telephone 342-6740

November 8, 1976

TO: All Wardens and Superintendents
FROM: Richard Crane
RE: Searches of Employees and Visitors

In order to preserve our rights to search visitors, vendors, and employees, signs must be posted at all entrances containing language generally conforming to the following:

> "All persons entering upon these grounds are subject to routine searches of their person, property, or packages."

Please note that unless there is a warrant, you cannot force a non-employee to submit to a search, but you can bar them from the institution. Strip and body searches should be conducted only after following the same procedures set forth for inmates in Dept. Reg. #30-25.

RC
lc

APPENDIX F
LOUISIANA STATE PENITENTIARY
UNIT OF THE DEPARTMENT OF CORRECTIONS
Angola, Louisiana 70712

C. Paul Phelps, Secretary of Corrections

Frank C. Black, Warden

Edwin W. Edwards, Governor

PLEASE ADDRESS YOUR REPLY TO:
CLASSIFICATION DEPARTMENT
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA 70712

April 19, 1979

Richard Thorne
912 Ida St.
Alexandria, La.

RE: Thorne, Scott
LSP #: 86584

Dear Mr. Thorne,

The above named subject, who is presently confined at this institution, has requested your name be placed on his approved visitors' list.

Before this request can be approved, it is necessary that we have the information requested below. Please furnish an answer to each question. Your reply will be treated as confidential. If this questionnaire is not returned before May 10, 1979 we shall assume you do not wish to visit with this subject. Do not attempt to visit before the Classification Department notifies you that you have been approved.

1. Do you wish to visit with this person? *Yes*

2. What is your correct address? *912 Ida Alexandria, La*
3. Are you married: *Yes*
4. What is your age? *49*
5. Date of Birth? *January 11, 1930*
6. Race: *Cau*
7. How long have you known this person? *All his life*
8. Your exact relationship to this person? *I am his Father*
9. Do you visit any other inmate? *Yes*
10. What is his name? *Richard J. Thorne*

**NOTE: If you are under 18 years of age, a letter of approval from your parent or guardian *must* be enclosed with this form. Any falsification may result in permanent denial.

I HEREBY AGREE TO A PERSONAL SEARCH BY SECURITY PERSONNEL OF THE LOUISIANA STATE PENITENTIARY WHILE ON PRISON GROUNDS.

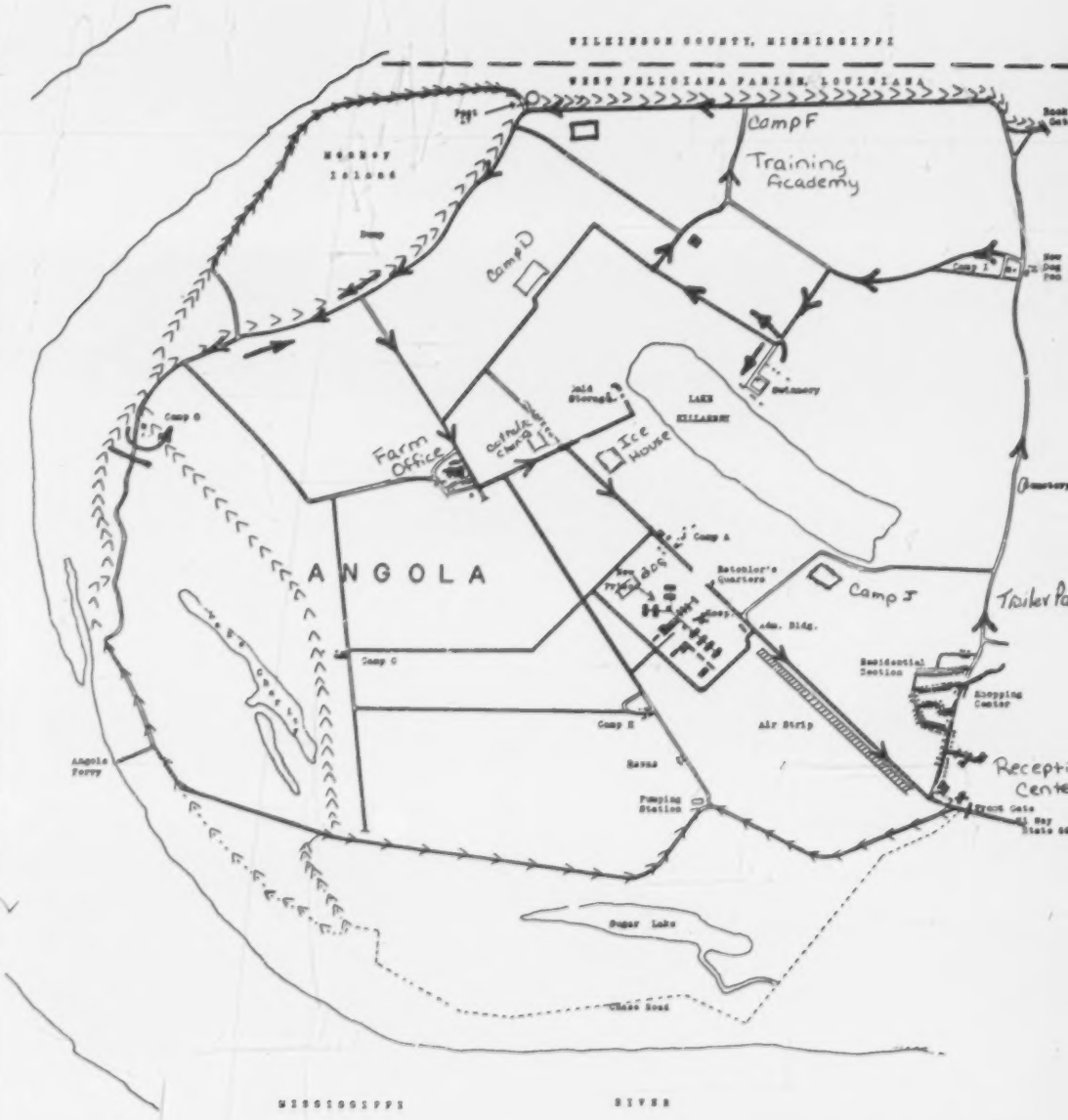
Sincerely,
/s/Larry Smith

rr
CLASSIFICATION DEPARTMENT

/s/Richard E. Thorne
Your Signature

/s/Peggy L. Thorne
Signature of Spouse, if married

APPENDIX G



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